

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0269-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FELIPE AYALA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Felipe Ayala appeals from a judgment convicting him on several felony and misdemeanor charges and from an order denying

postconviction relief.¹ The issue is whether the trial court erred by finding no purposeful discrimination in the State's decision to strike the only minority person among the prospective jurors. We conclude that the evidence deemed credible by the trial court is sufficient to support its finding, and therefore affirm.

The charges against Ayala stem from an incident that occurred in a bar after police approached him for information about his brother. During *voir dire* the prosecutor asked the prospective jurors if they drank alcohol, and seven replied that they did not. Barbara Helgeson, a Native American and apparently the only member of a minority group, was one of the seven, as well as one of those indicating that Ayala's Hispanic background and his use of alcohol would not affect their impartiality.

The prosecutor subsequently used a peremptory challenge to remove Helgeson. Ayala's counsel immediately objected and asserted that striking Helgeson was racially discriminatory. The prosecutor explained that he struck Helgeson because he wanted people on the jury who understood how alcohol affects individuals.² The trial court accepted the explanation but asked the prosecutor to restore Helgeson to the panel, to maintain "a clean record." The prosecutor declined the court's request and the trial proceeded without Helgeson. The jury ultimately found Ayala guilty on all charges.

¹ Ayala was convicted of the following felonies: (1) attempted first-degree intentional homicide; and (2) recklessly endangering safety (two counts). Ayala was also convicted of the following misdemeanors: (1) threatened use of a firearm while intoxicated; (2) carrying a concealed weapon; and (3) resisting/obstructing an officer (two counts).

² Of the seven jurors who did not drink, the prosecutor struck only Helgeson. Of the remaining prospective jurors, Ayala exercised two peremptory challenges, and a third juror was excused.

Ayala raised the issue of Helgeson's removal from the jury in his postconviction motion. The prosecutor testified at the motion hearing and reiterated that Ayala's use of alcohol before he committed his offenses was an issue of concern at trial, and explained that nondrinkers "may have differing ideas on how alcohol plays a part in someone's behavior, and they might not know the dynamics of that as well as somebody who does. They also might have preconceived notions ... regarding alcohol and alcohol consumption." For the first time, the prosecutor also stated that he did not know Helgeson was a Native American before he exercised his challenge. He explained that "based on [her] name ... and ... her appearance she didn't appear to me to be Native American.... [S]he didn't have ... the features that are normally attributed to Native Americans," and he testified that he had neglected to read her one-page jury questionnaire, which identified her race. Although he added that he rarely looked at jury questionnaires, he conceded that he was aware of information in the questionnaire of at least one other juror.

The trial court deemed the prosecutor's testimony credible in all respects, and consequently found that Ayala had failed to show that the prosecutor's explanation was a pretext for racial discrimination.

Purposeful racial discrimination in selecting a jury violates a defendant's right to equal protection. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). When alleging purposeful racial discrimination, the defendant must first make a prima facie showing that "the prosecutor has exercised peremptory challenges on the basis of race." *Hernandez v. New York*, 500 U.S. 352, 358 (1991). Once the defendant makes such a showing, the prosecutor must articulate a race-neutral explanation for striking the jurors in question. *Id.* at 358-59. Finally, the trial court must determine whether the defendant has shown purposeful discrimination.

Id. at 359. We review the trial court’s findings of fact at each step to determine whether they are clearly erroneous. Section 805.17(2), STATS.; *State v. Lopez*, 173 Wis.2d 724, 729, 496 N.W.2d 617, 619 (Ct. App. 1992). However, when a prosecutor offers a race-neutral explanation for a peremptory challenge without disputing whether the defendant made a *prima facie* showing that the challenge was based on race and the trial court has ruled on the ultimate question of intentional discrimination, that issue becomes moot. *State v. King*, 215 Wis.2d 294, 302, 572 N.W.2d 530, 533 (Ct. App. 1997). Because the prosecutor responded to Ayala’s objection by providing an explanation for the challenge and the trial court never ruled on the issue of whether Ayala had made a *prima facie* case, we shift our inquiry to the second and third steps of the *Hernandez* analysis.

The prosecutor’s stated reason for striking Helgeson is race-neutral: he sought to have jurors who understood the effects of alcohol because he perceived the effects of alcohol to be important to the case. And Ayala concedes that if the prosecutor’s explanation is found credible, it sufficiently establishes the absence of a discriminatory motive, satisfying the third step. He also recognizes that we will not reverse a trial court’s credibility findings unless the testimony at issue is incredible; “incredible evidence is evidence in conflict with the uniform course of nature or with fully established or conceded facts.” *State v. Oliver*, 84 Wis.2d 316, 324, 267 N.W.2d 333, 336 (1978).

Ayala argues that the prosecutor’s “inconceivable” explanation for the peremptory strike was incredible and meets the standard set out in *Oliver*. To support this position he notes that: (1) the prosecutor inexplicably failed to tell the court that he did not know Helgeson’s race at trial; (2) the prosecutor claimed that he did not read Helgeson’s jury questionnaire, although he evidently read the questionnaire of at least one other juror; (3) he never questioned Helgeson about

her beliefs and knowledge of alcohol; (4) he could not adequately state why he struck Helgeson but left other nondrinking jurors on the panel; and (5) he believed that Ayala's minority status was a significant factor at trial, as evidenced by his plea to the jury in closing that it not give Ayala preferential treatment as the member of a minority group.

We reject Ayala's contentions because, as the Supreme Court observed in *Hernandez*:

In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 365 (quoted source omitted). In this case, the prosecutor consistently maintained his race-neutral explanation for the challenge and during *voir dire* provided reasons why he chose not to challenge three of the other six prospective jurors.³ The prosecutor's explanation during *voir dire* and testimony during the postconviction hearing was the only evidence the trial court had before it. The trial court was in a position to observe the prosecutor's demeanor and assess his credibility throughout the trial and postconviction hearing.

³ The countervailing factors that made them desirable to hear the case, he said, were that: (1) one prospective juror had made a favorable impression in a related case; (2) one had sat on a guilty verdict in another case; and (3) one was involved with a local drug abuse prevention program and had contact with police officers.

While one might reasonably find the prosecutor's explanation for the challenge strained, and question his belated recollection that he was ignorant of Helgeson's race, one cannot reasonably say that the prosecutor's statements conflicted with "the uniform course of nature or with fully established or conceded facts." *Oliver*, 84 Wis.2d at 324, 267 N.W.2d at 336. By upholding the trial court's credibility determination—"the heart of the equal protection analysis"—"there seems nothing left to review." *Hernandez*, 500 U.S. at 367.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)(5), STATS.

